

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4 Richard Wentzel, et al., Civil No.: 11-cv-1236
(MJD/LIB)

5 Plaintiffs,

6 v.

7 Citimortgage, Inc.,
8 a corporation,

9 Defendant.
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18 Transcript of Motion to Dismiss
19 Friday, September 23, 2011
20 United States Courthouse
21 Duluth, Minnesota

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23 Court Reporter: Susan A. Seliga
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1 The proceedings were held in the above-entitled matter
2 before the Honorable Michael J. Davis, Chief Judge, U.S.
3 District Court, at the United States Courthouse, Duluth,
4 Minnesota, on Friday, September 23, 2011, commencing at
5 approximately 8:00 a.m.

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8 APPEARANCES:

9 Mr. Stephen F. Rufer
10 Attorney at Law
11 PEMBERTON, SORLIE, RUFER,
12 KERSHNER, PLLP
13 110 North Mill Street
14 P.O. Box 866
15 Fergus Falls, MN 56538
16 On behalf of the Plaintiffs

17 Mr. Kendall Bader
18 Attorney at Law
19 BARNES & THORNBURG, LLP
20 225 South Sixth Street
21 Suite 2800
22 Minneapolis, MN 55402-4662
23 On behalf of the Defendant

24 ALSO PRESENT:

25 Mr. Richard Wentzel, Plaintiff
 Ms. Debra Wentzel, Plaintiff
 Ms. Kristine Wegner, Courtroom Deputy

I N D E XPages

Argument by Mr. Bader.....	4
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Argument by Mr. Bader.....	20

E X H I B I T S--None

OBJECTIONS--None.

NOTE: Original transcript to be filed with the U.S.
District Court, Minneapolis, Minnesota.

1 (September 23, 2011)

2 (Convened at 7:57 a.m.)

3 THE COURT: Let's call this matter.

4 MS. WEGNER: Richard Wentzel, et al., versus
5 Citimortgage, Incorporated. Civil Case Number
6 11-cv-1236. Counsel, please state your appearances
7 for the record.

8 MR. RUFER: For the Plaintiff, Steven Rufer.
9 And with me are the Plaintiffs personally present,
10 Debra and Richard Wentzel.

11 THE COURT: Good morning.

12 MR. WENTZEL: Good morning, Your Honor.

13 MR. BADER: For the Defendant, CitiMortgage,
14 Kendall Bader, B-A-D-E-R. Good morning, Your Honor.

15 THE COURT: Good morning. You may proceed
16 with your argument.

17 MR. BADER: Thank you, Your Honor.

18 Morning, Your Honor. The case before us is
19 a relatively simple and straightforward matter.
20 Despite the fact that the Complaint contains numerous
21 factual allegations and a number of different legal
22 claims, there are really three, only three, material
23 facts, and they're all undisputed.

24 The first is that the purported modification
25 agreement between CitiMortgage and the Plaintiffs, by

1 Plaintiffs' own admission, was never reduced to
2 writing. The second material fact is that this
3 modification agreement also resulted undisputedly from
4 a one-on-one transaction between the Plaintiffs and
5 Citimortgage. The final undisputed fact is that for
6 five years Citimortgage -- or Plaintiffs have paid
7 their mortgage directly to Citimortgage without
8 question or comment.

9 In the interest of brevity, in his
10 responsive memorandum, the Plaintiff -- Plaintiffs
11 never contested that Minnesota Statute 513.33, which
12 requires a modification agreement such as the one at
13 issue in this case to be in writing, operates as a bar
14 to unwritten credit agreement -- to enforcement of
15 unwritten credit agreements. Plaintiff has not
16 contested that that statute bars their breach of
17 contract, common law fraud and misrepresentation
18 claims. So unless Plaintiff makes an argument that it
19 does, at this time I won't as well, unless the Court
20 feels it's necessary.

21 Moving on to their promissory estoppel
22 claim, Plaintiffs have argued that Section 513.33 does
23 not bar a promissory estoppel claim. This is counter
24 to the Minnesota Court of Appeals' ruling. Section
25 four -- 513.33 has a very broad scope. The language

1 says that it bars any action on an unwritten credit
2 agreement, which we have in this case, and action
3 means -- presumably, it means a cause of action.

4 The Minnesota Court of Appeals in the
5 case of *Greuling v. Wells Fargo Home Mortgage*,
6 conclusively held that 513.33 bars promissory estoppel
7 claims and misrepresentation claims. The Court of
8 Appeals in Minnesota has, as recently as April 2011,
9 reaffirmed its holding as we discuss in our reply
10 memorandum.

11 Further, the Plaintiff in their responsive
12 memoranda admits that 513.33 stands for the
13 proposition that there -- that promissory estoppel
14 claims are barred by that statute, but points out --

15 THE COURT: Well, aren't you a little bit
16 early in bringing that motion? Shouldn't it have been
17 at summary judgment time, because both *Myrlie* and
18 *Greuling* are summary judgment cases that where facts
19 are fully developed and so the Court can make the
20 determination?

21 MR. BADER: Well, I agree that --

22 THE COURT: It seems like it's the new
23 practice of the bar, is the rushing the Court on a
24 12(b)(6) motion, to have the Court dismiss cases out
25 without having any legitimate discovery or facts

1 before it to make a learned decision.

2 MR. BADER: I understand the Court's concern
3 about that. But it seems to me that the question of
4 whether or not 513.33 bars the promissory estoppel
5 claim is a matter -- is a question of law, not of
6 fact. I do admit that the court in the other cases
7 had a more full, factual record from which to decide.
8 But at the same time, they clearly ruled in all cases
9 that 513.33 is a bar to a promissory estoppel claim.
10 They didn't base that decision based on the facts of
11 the case. They based it on the statutory language and
12 the intent of the legislature when it passed, and
13 513.33 was passed to prevent creditors from having to
14 come in and litigate these claims of oral credit
15 agreements.

16 So I recognize the concern, and but at the
17 same time, if the factual allegations -- the factual
18 record isn't going to change whether or not 513.33
19 bars a promissory estoppel claim. And to the extent
20 that it doesn't, then arguably, as a matter of law,
21 the Plaintiffs haven't proved -- haven't alleged any
22 facts that would allow this Court to conclude that a
23 promissory estoppel claim is appropriate.

24 Plaintiffs have alleged that essentially
25 since 2008, they've been making a reduced payment on

1 their mortgage. It's hard to imagine why that is to
2 their detriment, as is required in a promissory
3 estoppel claim. Under the terms of the original note
4 and mortgage, Citimortgage had the right to foreclose
5 its mortgage at anytime when Plaintiffs couldn't meet
6 their obligations under the note. Rather than
7 foreclosing in August 2008, as would have been their
8 right, they -- they allowed the Plaintiffs to make a
9 reduced payment for a number of -- for more than a
10 year, as they worked towards trying to find a
11 modification agreement that would work. They
12 couldn't. And so at this point, they're sort of --
13 they had -- they had internally moved the matter to
14 foreclosure. They have yet to foreclose on
15 Plaintiffs' property. The Plaintiffs have been
16 staying in the property for -- since 2008, paying a
17 reduced mortgage. It's hard to imagine that that is
18 to their detriment.

19 And further, in another case in this
20 District -- and let me see if I can find the exact
21 language. Oh, in *Myrlie*, or *Myrlie*, I'm not sure if
22 I'm pronouncing that correct, *v. Countrywide Bank*,
23 this Court said that, Further, there's no injustice in
24 not enforcing an alleged loan modification agreement.
25 And the Court reasoned that in an arm-length's

1 agreement, there's no injustice in denying a debtor's
2 request to modify a credit agreement to terms more
3 favorable to the debtor and less favorable to the
4 creditor; and further, that enforcing the oral
5 modification agreement would run contrary to 513.33,
6 which was enacted to protect lenders from having to
7 litigate claims of oral promises.

8 So even taking all the allegations of the
9 Complaint as absolutely true, without developing the
10 factual record any more, I think that this Court can
11 rule as a matter of law that one, 513.33 provides an
12 absolute bar to the promissory estoppel claim; and
13 two, that even if it didn't, the Plaintiffs have not
14 alleged facts sufficient to support a claim of
15 promissory estoppel.

16 Moving on to the Plaintiffs' consumer fraud
17 claim, first, I think, arguably, Section 513.33,
18 because of its broad language, bars a Consumer Fraud
19 Act claim. Admittedly there's no statutory -- there's
20 no case law that demonstrates that, nor is there case
21 law that demonstrates that a Consumer Fraud Act claim
22 is allowed under 513.33. But even to the extent that
23 a consumer fraud claim is not barred under 513.33, it
24 is -- Plaintiffs' ability to pursue that claim is
25 based on the Minnesota Supreme Court's holding in the

1 *Ly v. Nystrom* matter which required that any action
2 brought pursuant to the Private Attorney General
3 Statute confer a public benefit. And that court also
4 held that, as a matter of law, that a transaction
5 involving -- or a one-on-one transaction, as a matter
6 of law, cannot provide public benefit.

7 And so I think it's undisputed that the
8 claim in this case -- or the agreement in this case
9 was the result of a one-on-one transaction between the
10 Plaintiffs and Citimortgage and, as a matter of law,
11 consequently, cannot provide a public benefit as
12 required by the Private Attorney General Statute.

13 Lastly, Plaintiffs have -- I shouldn't say
14 lastly. Second to last, the Plaintiffs have claimed
15 that Citimortgage has been unjustly enriched by
16 accepting their mortgage payments for more than five
17 years. Pursuant to the *Twombly* case, in order to
18 survive a motion to dismiss, a complaint must plead
19 facts with enough specificity to raise a right to
20 believe above the speculation level, and allegations
21 in a complaint must be plausible rather than merely
22 conceivable.

23 Plaintiffs have based their unjust
24 enrichment claim entirely on speculation. They claim
25 that Citimortgage has been wrongfully collecting their

1 mortgage payments for more than five years with no
2 contractual right to do so. With respect to a highly
3 sophisticated mortgage lender, that seems implausible,
4 highly implausible, and likely -- I mean, it is
5 arguably conceivable, but implausible.

6 The Plaintiffs also don't dispute that they
7 owe money under the note, only that Citimortgage is
8 wrongfully collecting the note. And so even if that
9 were true, the Plaintiffs wouldn't be entitled to a
10 refund of this money necessarily because they're not
11 the ones who have been injured by Citimortgage's
12 conduct. It's the purported owner of the note that is
13 not Citimortgage, but we don't know who it is. But --

14 THE COURT: So Citimortgage should keep the
15 money then.

16 MR. BADER: No, no. If this Court finds
17 that Citimortgage has been unjustly enriched, then I
18 would argue that the proper process or procedure would
19 be to deposit this money with the Court until the
20 Court can determine who the rightful party that is
21 entitled to this money is. It's clearly not the
22 Plaintiffs because the Plaintiffs have a mortgage
23 payment. And if the Plaintiffs were to receive the
24 money, then they themselves would be unjustly
25 enriched.

1 THE COURT: I guess you've just ruled on
2 that motion, haven't you?

3 MR. BADER: Depending on how the Court
4 feels, right, because ultimately --

5 THE COURT: I think you're getting a feeling
6 of how the Court feels, aren't you?

7 MR. BADER: But ultimately -- I understand
8 your point. But ultimately, the Plaintiffs' conduct
9 with respect to Citimortgage demonstrates that they
10 don't actually believe that there's another
11 noteholder. They have been paying, without question
12 or comment, their mortgage payment to Citimortgage
13 since 2006. When they were unable to make their
14 mortgage payment, they contacted Citimortgage directly
15 asking them for help. They have engaged in
16 negotiations with Citimortgage over the modification
17 of this promissory note for two years, more than two
18 years. And the fact that they now say that
19 Citimortgage doesn't hold the note just seems to run
20 counter to their conduct. I think that this is --
21 this unjust enrichment case is a sort of
22 show-me-the-note type action. They're asking
23 Citimortgage to demonstrate that they hold the
24 promissory note. But as this Court has and courts in
25 Minnesota and courts elsewhere have all routinely

1 held, Citimortgage does not have a right -- does not
2 have a duty to show the note to somebody who asks for
3 it merely because the other party is asserting that
4 Citimortgage doesn't hold the note.

5 So lastly, Your Honor, and I'm sorry if I've
6 run long, but Plaintiffs have not really in any way
7 been damaged by Citimortgage's conduct. They must
8 have incurred some loss in order to have been damaged.

9 As we discussed previously, Plaintiffs were
10 required to make their mortgage payments under the
11 original note and mortgage. Had they continued -- had
12 they not made those payments starting in August 2008,
13 Citimortgage would have already foreclosed on its
14 mortgage and Plaintiffs would be without their
15 property right now. And the payments made by the
16 Plaintiffs under their note, and they were reduced
17 payments, no less, are not really losses because they
18 had a contractual obligation to make those payments.
19 And hence, they're not damaged.

20 So unless the Court has any questions, thank
21 you, Your Honor.

22 THE COURT: Thank you. Counsel?

23 MR. RUFER: May it please the Court, counsel
24 has argued that there are three key facts to this
25 case. In fact, there is a key fact that has been

1 alluded to, but was not specifically called to the
2 Court's attention. And that is that Citibank does not
3 hold any rights to receive these payments. This, of
4 course, is a Rule 12 motion. And the Complaint
5 indicates that Citigroup has notified the Plaintiffs
6 in 2010, after having accepted payments for four
7 years, that they do not have an assignment of the
8 mortgage, and there's been no contrary allegation.
9 And, of course, if there were, it wouldn't affect a
10 Rule 12 motion.

11 We were unable to find any similar cases
12 where a purported lender has claimed a right to
13 collect payments and had no support, apparently, for
14 that supposed right. All of the other cases dealing
15 with the issues here, the promissory estoppel cases,
16 *Myrlie, Greuling*, they all deal with lenders who held
17 the paper, had a -- had a mortgage or had an
18 assignment. The Wentzels have never had a contract
19 with Citimortgage. They had a contract with a company
20 called Harmonic Mortgage, which may or may not exist
21 anymore. We don't know that. And it's been nearly a
22 year now, I think that was in December of 2010, that
23 the Wentzels were notified that Citigroup could no
24 longer deal with them, and that they were, in effect,
25 stuck in limbo. They couldn't negotiate an agreement

1 and they -- and they couldn't proceed with the
2 foreclosure that Citigroup has attempted to start
3 against them because Citigroup doesn't hold the paper.

4 So under those circumstances, to look first
5 at the unjust enrichment claim, certainly the Wentzels
6 owe someone on this note, but they expect to owe
7 someone who is in a position to negotiate with them,
8 if necessary, but certainly in a position to satisfy
9 their mortgage when it is ultimately paid off. And at
10 the present time, that isn't Citimortgage. And as far
11 as we know, it never was. There's no contrary
12 allegation in the record to suggest that they held an
13 assignment and lost it or any such thing.

14 There are cases that -- there's a line of
15 cases, as counsel has indicated, the show-me-the-note
16 cases, and that is, as I understand it, a sort of a
17 claim that's been made in some foreclosure cases where
18 the homeowner or the debtor has alleged that unless
19 the original mortgage or note can be produced, there
20 can't be a valid foreclosure. That's certainly not
21 the case here. And in this -- in all of those cases,
22 the lenders had assignments, or had original
23 mortgages. They were recorded. They had copies of
24 them. It's just that they didn't have the original.
25 We're certainly not making a frivolous claim of that

1 sort here.

2 It's been suggested that our unjust
3 enrichment claim is based on speculation. And the
4 reason for that is sort of a trust-us attitude of,
5 surely a big company wouldn't take the position that
6 they own the mortgage, but never did. Obviously, they
7 know something about our mortgage because they knew
8 our name and address and they knew about the property.
9 But with all of the mortgage shuffling that took place
10 in recent years, we have no idea whether it was also
11 on a list that was sold to Bank of America or Wells
12 Fargo or kept by Harmonic at the end of the day. And
13 so the Wentzels are truly in an impossible position
14 here to try to make continued payments, which they
15 have attempted to do, and those payments have been
16 refused. But they don't know whether Wells Fargo will
17 show up some day and say, oh, well, we're the ones
18 that have the assignment. And it's -- it's easy for
19 counsel to suggest, well, Wells Fargo can just get the
20 money from Citi if and when that happens. But in the
21 meantime, we are out the money. And that would put
22 the Wentzels in a position of having to deal with two
23 bureaucratic institutions, and it would -- it would
24 not be a pleasant situation for them.

25 Reviewing the claims in this case, on the

1 promissory estoppel claim, clearly we meet the
2 elements of promissory estoppel unless 513.33 stands
3 in the way. The *Myrlie* case, Judge Boylan's opinion
4 in that case is very fact specific. And he refers to
5 513.33 as well, but also finds that the plaintiff in
6 that case failed to meet the elements of promissory
7 estoppel. And in *Myrlie*, as in every other single
8 case that we've been able to find, Countrywide owned
9 the mortgage. They were the proper owner of the
10 mortgage. In that case, the homeowner couldn't make
11 the payments.

12 In this case, the Wentzels made every
13 payment under their agreement to Citimortgage and have
14 continued to make them into escrow since. And in
15 *Myrlie*, the plaintiff couldn't remember any of the
16 facts of the supposed modification. Here the
17 modification is spelled out in exquisite detail down
18 to the interest rate and the payments and every
19 conceivable detail, and it was reaffirmed several
20 times.

21 As to the Consumer Fraud Act, applicability
22 to the act, the *Ly versus Nystrom* case, the Minnesota
23 case, was one that involved the sale of a restaurant.
24 It was clearly a one-on-one transaction between two
25 business people. It was not like a vacuum cleaner

1 salesman going door-to-door and fraudulently
2 misrepresenting the vacuum cleaners. In the -- in the
3 two federal cases that have dealt with the issue,
4 Judge Frank's opinion in the *Bartol* case and Judge
5 Montgomery's opinion in the *Peterson-Price* case, the
6 issue was, once again, a valid mortgage, an apparently
7 valid foreclosure, and an arguably nit-picking defect
8 in whether the Truth in Lending Act was complied with
9 properly or whether the defects in the change of --
10 chain of title --

11 THE COURT: I have great respect for Judge
12 Frank and Judge Montgomery, but I have to make my own
13 decision.

14 MR. RUFER: I understand that, --

15 THE COURT: They're not --

16 MR. RUFER: -- Your Honor.

17 THE COURT: They're not my appellate court,
18 so...

19 MR. RUFER: And I fully understand that.
20 And were it necessary to distinguish those cases, I
21 think they are very distinguishable. I think if the
22 issue is, as the Minnesota court has said in the *Ly*
23 case, there has to be a public benefit and a public
24 interest. There is a clear public benefit here, I
25 think, where we have a lender who is sort of

1 flip-flopping and taking the position, this is our
2 mortgage, we can modify it; no, it isn't our mortgage,
3 we can't modify it, but we are foreclosing; and no,
4 we're not foreclosing it. That's a tremendous burden
5 to put the public through. And we can't help but
6 believe that once we get into discovery in this case,
7 we'll discover that it is a practice that affected a
8 large number of people, more than just my clients in
9 this case.

10 Finally, Your Honor, as to -- as to the
11 fraud claim, in effect, the defense to our fraud claim
12 is sort of an allegation that we have waived it. But
13 we've done no such thing. In our -- in our brief at
14 page 10, we clearly point out to the Court that the
15 two acts of fraud here are the continued promise that
16 papers are in the mail, even though they weren't, and
17 the continued promise that Defendant was the owner of
18 Plaintiffs' mortgage and note, when after four years,
19 they said, oh, no, I guess maybe we're not. And I
20 think those allow us to go together -- to go forward
21 on the issue of fraud.

22 As to damages, the claim is advanced that we
23 owe money to somebody anyway; so, therefore, we aren't
24 damaged. But the problem in this case is that we
25 don't owe the money to Citi based on the Complaint.

1 And so we are damaged by the fact that they have our
2 money. If and when the correct holder of the note, if
3 it is not Citi, steps forward, that money isn't in our
4 checking account. It's in Citi's. And we're going to
5 be the ones caught in the middle to have to straighten
6 that out. So I think that's a very real element of
7 damage in this case.

8 Thank you very much, Your Honor.

9 THE COURT: Thank you. Anything further,
10 counsel?

11 MR. BADER: Just briefly, Your Honor.

12 THE COURT: Yes, please.

13 MR. BADER: Thank you, Your Honor. Just, I
14 think, essentially one. Plaintiff has -- Plaintiffs'
15 counsel has repeatedly discussed this issue of the
16 note and the mortgage and not being able to --
17 Citimortgage not showing the Plaintiff that it holds
18 the note, and that if Citimortgage, or their
19 allegation that Citimortgage is waiving on an
20 assignment before it can proceed with the foreclosure
21 process. It should be noted, and I -- and I do not
22 have the exact name of this case. And I can send it
23 to Your Honor if you would like. But the *Jackson*
24 (phonetic) case in Minnesota, I believe it's a Supreme
25 Court case --

1 THE COURT: Well, if you're going to cite a
2 case to me, I think it's appropriate that I have the
3 appropriate cite and that opposing counsel have the
4 cite so we can look at it and see whether or not it
5 says what you say it says.

6 MR. BADER: And I totally understand, Your
7 Honor. I'd be more than happy to send that to you and
8 to opposing counsel. And if I'm wrong, then I expect
9 your wrath, and it would be justified. But that case
10 stands for the proposition that a note and a mortgage
11 travel separately. There is no requirement that a
12 note be recorded. And so --

13 THE COURT: Well, let's back up. Proper
14 procedure as an attorney in court, if you're going to
15 cite a case, you have to make sure that you have the
16 cite --

17 MR. BADER: Okay.

18 THE COURT: -- and that the Court has that
19 cite, and that opposing counsel has that cite. That
20 has nothing to do with my wrath. That's just the
21 normal course of the proper acting as an attorney.
22 And I don't -- I don't apologize for me stopping you
23 on that point because you're saying you don't even
24 know the name, and then you're going to say, this is
25 what the case holds, and then the opposing counsel

1 can't check that, and I can't check that. Counsel,
2 no, you know better than that.

3 MR. BADER: You're right, Your Honor. I
4 only bring it up now -- I did not anticipate --

5 THE COURT: But your comment to me about my
6 wrath --

7 MR. BADER: I apologize for that. And I
8 understand it's not your wrath. I just meant that you
9 would be justified in being displeased with me if I
10 misrepresented something to the Court, which I do not
11 intend to do.

12 THE COURT: I understand that. But the
13 normal procedure is to ask the Court, Your Honor, I
14 believe there's another case that is on point here.
15 May I supply it to you and opposing counsel and have
16 further briefing on that issue, a one-page brief,
17 instead of quoting it here. And opposing counsel,
18 having nothing before him, is at a loss, and the Court
19 is at a loss because I can't run back and pull up the
20 case and take a look at it.

21 MR. BADER: I understand.

22 THE COURT: You see how unfair that is?

23 MR. BADER: I do understand, Your Honor, and
24 I apologize to you and to opposing counsel. And if
25 this Court would allow it, I would ask that I be

1 allowed to submit this case with proper citation and a
2 short brief as to what it stands for to you and
3 opposing counsel.

4 THE COURT: No. Should have done that
5 beforehand. That's why I think this is -- this motion
6 is way too early. Anything further?

7 MR. BADER: No. I don't feel I could add
8 anything to that.

9 THE COURT: All right. I'll take this
10 matter under advisement. And I think I've given a
11 clear indication of what I think of it. I am going to
12 order you to see Magistrate Judge Brisbois this
13 morning. He is available for a settlement conference.
14 And you're ordered to see him this morning to see if
15 this matter can be settled. All right. Anything
16 further?

17 MR. RUFER: Nothing further, Your Honor.

18 MR. BADER: No, Your Honor.

19 MS. WEGNER: All rise. Court is in recess.

20 (Concluded at 8:23 a.m.)

21 * * *

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1 I, SUSAN A. SELIGA, a Notary Public, do hereby certify
2 that the foregoing proceedings were taken by me in the
3 above-entitled action on September 23, 2011; that in
4 accordance with 28 U.S.C., Section 753(b), I certify that
5 the transcript herein is a true and correct record, to the
6 best of my ability, of the proceedings in the United States
7 District Court for the District of Minnesota before Chief
8 Judge Michael J. Davis on September 23, 2011.

9 I further certify that I am not a relative, employee,
10 attorney or counsel of any of the parties or attorneys or
11 financially interested in the event of this action.

12 IN WITNESS WHEREOF, I have hereunto set my hand and
13 affixed my seal of office this _____ day of October, 2011.
14
15
16

17 _____
18 Susan A. Seliga
19 Notary Public
20 My State of Minnesota Commission
21 expires January 31, 2014
22
23
24
25